No. 92-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. § 522(6). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments, including issues of state and local legislative and regulatory authority.

While cities and States are the primary regulators of cable television and related technologies and for that reason have an evident interest in the impact of this case on the scope of their authority to regulate SMATV facilities, *amici* have at least as great an interest in the manner in which the federal courts conduct review of regulatory legislation. *Amici* submit that the analysis of the court of appeals reflects a fundamentally flawed approach to judicial review that poses a significant threat to routine exercises of legislative and regulatory authority by cities and States.

Application of the court of appeals' methodology to legislative and administrative actions taken by States and municipalities would seriously impair the ability of these bodies to engage in routine economic regulation. Not only does the court of appeals' approach impermissibly intrude on legislative power, many state and local governments lack the resources to develop the detailed legislative record required by the court of appeals, or to defend the multiplicity of challenges that its methodology would invite. The intrusive approach to judicial review adopted by the court of appeals therefore presents an even graver threat to state and local legislative authority than it does to the legislative authority of the federal petitioner in this case.

Because the court of appeals' analysis, unless corrected, could have serious negative consequences in areas of vital interest to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

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[1] In accordance with Rule 37 of the Rules of the Supreme Court of the United States, the parties' letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case and set forth the following summary of facts and procedural history relevant to *amici*'s argument.

At issue in this case is the Cable Act's [2] exemption from regulation of those cable communications facilities "that serve[] only subscribers in 1 or more multiple unit dwellings under common ownership, control. or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. § 522(6)(B). To fall within the scope of this exemption, a facility must (1) serve only subscribers in multiple unit dwellings in buildings which are all under common ownership, control, or management; *and* (2) not use any public right-of-way. The plain language of this exemption expressly leaves subject to state or local regulation those satellite master antenna television (SMATV) facilities that use cable to link separately owned buildings and do not use any public right-of-way, even though physically similar SMATV facilities that link commonly owned buildings are exempted from such regulation.[3]

In its initial consideration of respondents' challenge to the statute, the court of appeals found that the legislative distinction between facilities linking commonly owned multi-unit dwellings and those linking separately owned multi-unit dwellings raised equal protection concerns under the due process clause of the fifth amendment. Pet. App. 31-36a. It asked

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[2] The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*

[3] The terms "commonly owned" and "separately owned" are used herein as shorthand references encompassing ownership, control, and management.

the FCC to supply it with "additional 'legislative facts' concerning the distinction . . . ." *Id.* at 36a. Chief Judge Mikva wrote a separate opinion in which he identified several conceivable bases for the legislative distinction and criticized the panel majority for showing "too little reluctance to overturn complex economic legislation under the minimal rational-basis test". Pet. App. 37a.

Unsatisfied with the response of the FCC to its request for additional legislative information, Pet. App. 46-52a, the panel majority, in a second opinion, struck down the legislative distinction as a violation of equal protection. Pet. App. 4a. It based its holding on the failure of the FCC to "flesh out" the rationales suggested by Chief Judge Mikva "or to suggest some alternative rationale." *Id.*

SUMMARY OF ARGUMENT

Judicial review of legislation is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). The Court accordingly applies a highly deferential standard of review when assessing the validity of state or federal regulatory statutes. "States are accorded wide latitude in their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Legislative "line drawing" is presumptively valid and must be upheld if any conceivable basis for it exists: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Moreover, those challenging the distinc-

tion bear the burden of demonstrating that such facts "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

The court of appeals disregarded these rules, and more. Despite the highly plausible justifications for the Cable Act's classification that were advanced by Chief Judge Mikva and adopted by the FCC, Pet. App. 50a, the panel majority nonetheless invalidated the challenged statutory provision. The basis for its decision was the perceived failure of the agency to "flesh out" the rationales suggested by Chief Judge Mikva, "or to suggest some alternative rationale." *Id.* at 4a.

In so doing, the panel majority erroneously placed the burden on the agency by insisting that it offer "legislative facts" sufficient to justify to the court's satisfaction the regulatory distinction drawn by Congress. *See* Pet. App. 36a. When conceivable bases for the distinction were brought to its attention in Chief Judge Mikva's concurrence (and subsequently endorsed by the FCC) the court of appeals did not require that those bases be disproved by respondents, as the rational basis standard would require. Instead, it cavalierly dismissed them out of hand as "naked intuition." Pet. App. 4a.

Amici submit that if the court of appeals' unprecedented approach to rational basis review is not corrected, routine state and city regulatory legislation will henceforth be subject to a heightened review that will seriously impede the functioning of government. As the Court has said, "the machinery of government would not work if it were not allowed a

little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). The Court has, moreover, repeatedly recognized that "[a] state legislature . . . . cannot record a complete catalogue of the considerations which move its members to enact laws." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937), *quoted in Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Only by virtue of a very strong presumption of the validity of legislation, based upon the legislature's singular awareness of the conditions giving rise to statutory classifications, "is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.*

With respect to the specific issue of regulatory control presented, the court of appeals' decision improperly invalidated a clear, express legislative determination. The Cable Act plainly states on its face that factors other than the use or nonuse of public rights-of-way determine whether a particular SMATV facility is subject to state and local control. Rather than assessing the rationality of the resulting distinction on its own terms by exploring conceivable bases and requiring them to be disproved, the court deemed the distinction irrational—apparently because it deviated from the court's own notion of the use of a public right-of-way as the proper benchmark for regulation. *See* Pet. App. 4a; Pet. App. 34-35a.

The court of appeals thereby erred. Regardless of whether Congress *could have* chosen to predicate state and local regulatory authority on use of public rights-of-way, it did not do so. Because this legislation did not result in a legislative distinction so "palpably arbitrary" as to offend equal protection, the court of appeals could not validly tamper with

that choice simply because it found a different division of power more conceptually appealing. *See, e.g., Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69 (1913).

ARGUMENT

I. THE COURT OF APPEALS PROFOUNDLY ERRED IN THE MANNER IN WHICH IT CONDUCTED RATIONAL BASIS REVIEW OF THE CABLE ACT

The decision to invalidate legislation on constitutional grounds "is the gravest and most delicate duty that this Court is called upon to perform." *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Powell applied *Blodgett*'s admonition to federal court review of state legislation, cautioning that "[t]he awesome power of this Court to invalidate . . . legislation . . . must be exercised with the utmost restraint." *Id.* at 464 & n.67 (Powell, J., dissenting) (citation omitted).

The Court accordingly affords a strong presumption of validity to legislation, particularly regulatory legislation that requires line drawing. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and the burden is on those challenging the legislation to show that no such facts exist. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). This settled regime is essential to the proper working of government at all levels—state and local as well as federal.

The court of appeals flouted each of these rules and concerns in its review of the challenged distinction

drawn in the Cable Act. It blithely invalidated the clear, express language of economic regulatory legislation without regard to the presumption of validity. It ignored rationales for the legislative distinction articulated by Chief Judge Mikva and adopted by the FCC. It improperly faulted the agency for failing to further "flesh out" the rationales for the legislative distinction rather than requiring respondents to disprove the conceivable bases for the distinction. The court below, in short, created an erroneous precedent that undermines the proper functioning of government by improperly expanding the role of the federal judiciary in an area of utmost sensitivity and importance.

A. Legislative Line Drawing Carries A Strong Presumption of Validity and Must Be Upheld If Supported By Any Conceivable Basis

The universe of cable communications technology encompasses a wide array of types of facilities. In deciding which technologies would be subject to local regulation, Congress was required to engage in line drawing. Recognizing the inherent difficulties involved in drawing a line within a given spectrum, the Court has traditionally afforded a strong presumption of validity to such legislative efforts. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

To survive rational basis review, a line need not be drawn with mathematical precision. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814 ("a surveyor's precision" is not required in making legislative distinctions).[4] A valid classification may be

[4] *See also City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (classification need not be made with "mathematical nicety")

underinclusive, overinclusive, or both. *See, e.g., Vance*, 440 U.S. at 103; Laurence H. Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988). As the Court stated in *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975), "the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." Assertions that the line could have been drawn in a different or more precise manner are irrelevant. *See U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (classification "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . .") (internal citation omitted).[5] For all of these reasons, the Court has cautioned that

(citing *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *City of New Orleans v. Dukes*, 427 U.S. at 303 ("rational distinctions may be made with substantially less than mathematical exactitude"); *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338, 354-55 (1907) ("exact wisdom and nice adaptation of remedies" not required).

[5] In areas of economic regulation, very fine distinctions have routinely been upheld. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. at 27-28 (upholding a statute which distinguished between skating and dancing, noting that "[t]he differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational-basis scrutiny."); *Texaco, Inc. v. Short*, 454 U.S. 516, 539-40 (1982) (upholding the exemption of owners of ten or more mineral interests in one county from the lapsing of interest); *Heath & Milligan Mfg. Co.*, 207 U.S. at 355-56 (upholding distinction between types of paint for purposes of a labeling requirement).

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (footnotes omitted).[6]

The Court has embodied these concerns in its test for determining whether state or federal regulatory legislation survives an equal protection challenge. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (state legislation) (collecting cases). *See also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)). Under this standard, any conceivable purpose attributable to a rational legislature will suffice, whether or not that purpose motivated the legislature or was articulated by the legislature. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179.[7] As the Court emphasized in *Fritz*:

[6] *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) ("The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible."); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 425 (1952) ("if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision").

[7] The "conceivable purpose" must, of course, be a legitimate governmental objective. *Zobel v. Williams*, 457 U.S. 55, 63 (1982).

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

Id. (citing *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Nor, in its search for a conceivable basis for a distinction, is a court "bound by explanations of the statute's rationality that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988).

Under this Court's cases, moreover, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 110-11. *See Lindsley*, 220 U.S. at 78-79 ("one who assails the classification in such a law must carry the burden of showing that it is arbitrary . . . ").[8] Because the challenging party bears this burden, "[t]he State is not compelled to verify logical assumptions with statistical evidence." *Vance*, 440 U.S. at 111 n.28 (citation omitted). *See also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). The burden is a very heavy one: "[M]erely tendering evidence in court that the legislature was mistaken" is insufficient. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S.

[8] *See also Lehnhausen*, 410 U.S. at 364 (" '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' ") (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

456, 464 (1981). If the facts are "at least debatable," the distinction must be upheld. *Id.*[9]

B. Minimum Scrutiny Rational Basis Review Is Essential to the Proper Functioning of Government

There is no alternative to the foregoing "relaxed and tolerant form of judicial scrutiny," *City of Dallas v. Stanglin*, 490 U.S. at 26, if the system of government created by the Constitution is to function in our complex world. The Court has long recognized that "the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co.*, 282 U.S. at 501. *See also Kotch v. Board of River Port Comm'rs*, 330 U.S. 552, 556 (1947). As Chief Judge Mikva explained below:

> Because the only alternative would be to discourage legislators from making even an attempt to address complicated social and economic problems, the Constitution wisely permits legislative bodies to piece together practical plans—"rough accommodations," as the Supreme Court put it long ago, "illogical, it may be, and unscientific."

Pet. App. 38a (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)). *See City of Dallas v. Stanglin*, 490 U.S. at 26; *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). "Great freedom of discretion" must necessarily be afforded

[9] *See Vance*, 440 U.S. at 112 ("it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute") (citing *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)). *See also Heath & Milligan Mfg. Co.*, 207 U.S. at 355-56 (rejecting equal protection challenge because the "record certainly does not present any *data* to make it certain that the discretion was arbitrarily exercised") (emphasis in original).

legislatures "on account of the complex problems which are presented to the government." *Heath & Milligan Mfg. Co.*, 207 U.S. at 354.

This tolerance for inexact legislative solutions furthers another constitutionally recognized objective—that of "legislative convenience." *Vance*, 440 U.S. at 109. Equal protection does not mandate the depletion of government resources that would accompany a case-by-case factual assessment where economic regulation is involved. *See id.* at 109; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (declining to fault State's legislative classification concerning continuing fitness for employment merely because "the State chooses not to determine fitness more precisely through individualized testing"). Imperfect classifications are therefore tolerated even though they may not reach all, or only, those whom the legislature wishes to target.

The alternative would make the regulatory work of state, city, and federal government unduly cumbersome or even impossible. The Court has acknowledged, for example, that a state legislature

> cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. *Only by faithful adherence to this guiding principle of review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.*

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937) (emphasis added), *quoted in Lehnhausen*, 410 U.S. at 364-65.

The large volume of legislation which the States enact each year, coupled with budgetary limitations on staff size, limits their ability to develop detailed legislative records documenting the motivation behind each regulatory distinction. *See* Council of State Governments, *The Book of the States: 1992-93 Edition* at 183-84 (1992) (reporting the number of bills and resolutions introduced and enacted in each State's legislature during the 1990 and 1991 regular sessions); *id.* at 132 (noting that, in recent years, "budget problems in many states have slowed the growth in the number of legislative staff"). Indeed, some state legislative bodies do not even produce an indexed, permanent journal of legislative action, making the reconstruction of legislative intent even more difficult. *See* National Conference of State Legislatures, *Inside the Legislative Process* 90-91 (1991).

Local governments are, in many cases, even less well-equipped than States to furnish legislative history in support of challenged regulatory distinctions. The minutes maintained by local governments—typically their only documentation of legislative action—frequently do not record the arguments made in support of and in opposition to legislation; they often contain little more than the voting record on a given enactment.

For these reasons, *amici* respectfully submit that the intrusive approach to judicial review adopted by the court of appeals would not only impede the functioning of the federal government, it would—to an even greater degree—impair the exercise of regulatory authority by States and local governments.

C. The Court of Appeals Failed Properly to Conduct Rational Basis Review

The court of appeals plainly failed to conduct its review of the Cable Act in accordance with the foregoing standards. The approach of the panel majority to this case, in Chief Judge Mikva's words, evidenced "too little reluctance to overturn complex economic legislation under the minimal rational-basis test." Pet. App. 37a.

Congress' decision to classify SMATV facilities serving commonly owned buildings differently than SMATV facilities serving separately owned buildings should have been upheld because, as is demonstrated below, ample "facts reasonably may be conceived to justify" the classification. *McGowan v. Maryland*, 366 U.S. at 426. *See* discussion *infra* at 17-21. Because this test is plainly satisfied, it is irrelevant for purposes of constitutional analysis that other regulatory classifications of SMATV facilities are imaginable, either by the courts or the parties, or that criticisms may be made by certain interested persons against the line ultimately drawn by Congress. It is, for example, irrelevant that Congress' classification of SMATV facilities may be faulted for underinclusiveness, overinclusiveness, or both. *See, e.g., Massachusetts Bd. of Retirement*, 427 U.S. at 314-17 (upholding mandatory retirement age set by state law despite its overinclusiveness). Hence, respondents' contention that some SMATV facilities serving commonly-owned buildings may be larger than some serving separately-owned buildings (Br. in Op. at 15) is of no moment.

The court of appeals compounded its error by requiring the agency to "flesh out" reasons for the distinction, and invalidating the statute because of the

agency's asserted failure to do so. This Court's cases require respondents, as those "assail[ing] the legislative judgment," to "carry the burden of showing that it is arbitrary." *Lindsley*, 220 U.S. at 78-79. Instead, the court appeals improperly relieved respondents of this burden altogether by simply dismissing proffered bases for the distinction as "naked intuition." Pet. App. 4a. Respondents instead should have been required to prove—beyond debate, *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 464—that the classification "is both arbitrary and irrational." *Kadrmas*, 487 US. at 463. Moreover, the motivation for a legislative distinction is not legally relevant to the reviewing court's limited task. *See Fritz*, 449 U.S. at 179. In reviewing the rationality of the line drawn in the Cable Act, the court of appeals' task was to determine whether respondents had conclusively disproven any and all proffered bases for the distinction as well as those otherwise apparent from the face of the statute, an inquiry that the court totally failed to undertake.

A judicial requirement that sufficient legislative facts be adduced to support each challenged regulatory measure is unwarranted and constitutionally subversive. The court of appeals' novel and expansive approach to rational basis review threatens not only the ability of Congress to engage in routine economic regulation, but in a like respect the functioning of state and local governments. For these reasons, *amici* respectfully request that the judgment below be reversed.

II. THE DISTINCTION DRAWN IN THE CABLE ACT EASILY SATISFIES RATIONAL BASIS REVIEW

A. There Are Multiple Conceivable Bases For the Definitional Distinction Between Facilities Serving Commonly and Separately Owned Multi-Unit Dwellings

The distinction drawn in the Cable Act must be upheld on rational basis review if any conceivable purpose for it exists. Hence the statute must be upheld if even *one* of the reasons offered for it or otherwise discernable from the statute has a rational basis. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 465. In fact, at least three reasons support the challenged legislative classification.

1. *SMATV Facilities Serving Separately Owned Buildings Present Problems To the Viewer Similar To Those Associated With Traditional Cable Systems*

In his concurring opinion, Chief Judge Mikva suggested that Congress could reasonably have distinguished between facilities serving commonly and separately owned buildings on the ground that the latter are "similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer." Pet. App. 43a (Mikva, C.J., concurring). Because they are unable to resort to a single landlord or building manager, residents served by a quasi-private SMATV system would be less able to ensure that the system was responsive to their needs and interests. *See id.* at 43a. As Chief Judge Mikva noted, this rationale corresponds with one of the purposes stated on the face of the Cable Act: to "establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2); *see* Pet. App. at 43a.

2. *SMATV Facilities Serving Separately Owned Buildings Present Diversity Of Information Problems Similar To Those Presented By Traditional Cable Systems*

Another purpose of the Cable Act, stated on the face of the statute, is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). As Chief Judge Mikva noted, Congress might rationally have believed that regulation of quasi-private SMATV facilities was necessary to encourage diversity of information, whereas the wholly private systems, which are usually smaller and more susceptible of viewer input, would present less of a concern in this regard.[10] Pet. App. at 43a. Congress could have rationally chosen to draw a line between quasi-private and wholly private facilities so as to minimize the threat to diversity of information while preserving the ability of landlords to procure service for residents in their own building complexes.[11]

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[10] The fact that counterexamples could be imagined (*e.g.*, a given quasi-private system might serve fewer viewers than a given wholly private system) provides no basis for rejecting this rationale, as long as Congress could rationally have found that, on balance, the classification furthered its purpose. A statutory distinction may be both underinclusive and overinclusive without running afoul of the equal protection clause. *See* discussion *supra* at 8-9.

[11] The fact that Congress has left unregulated another universe of communications technology—facilities such as microwave or satellite systems that do not use physical cables—that might also present similar diversity concerns is of no relevance. Congress may choose to regulate incrementally, or may find that with respect to non-cable technologies the costs of regulation outweigh the benefits. It is well settled that equal protection principles do not prohibit a piecemeal, limited, or phased approach to a particular regulatory field. *See, e.g., Dukes*, 427 U.S. at 305; *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

3. *SMATV Systems Serving Separately Owned Buildings Present Competitive and Distributional Equity Problems Similar to Those Presented By Traditional Cable Systems*

Congress could also have rationally based its distinction between facilities serving commonly and separately owned buildings on the relative ability of free market forces to operate in those respective realms. Where an SMATV system serves commonly owned or operated buildings, the single owner or manager can weigh the offers of various SMATV providers and select the one that best suits the needs of the subscribers (as those needs have been communicated to the single owner or manager). In such an instance, effective competition between various SMATV providers can exist.

In contrast, where buildings in a complex are owned and managed by multiple parties, there is no coordinating mechanism for negotiating for the best system for all of the subscribers affected. Indeed, as noted earlier, there is not even any centralized method for determining what the needs and interests of the various subscribers are. Congress could well have decided that a single owner going out into the competitive marketplace to procure SMATV service is in a fundamentally different position requiring less regulatory protection than are unrelated concerns, lacking any centralized mechanism for decisionmaking, that seek to procure cable service for their entire collective communities.

Moreover, the limited scope of the wholly private SMATV system does not present the same "cream

skimming" threat to existing franchised systems as does the quasi-private system. Permitting unregulated SMATV systems to serve low-cost, high-profit pockets of consumers erodes the central economic premise of a franchising system—that of cost-spreading. *See* Br. Nat'l. Cable Television Ass'n (NCTA) in Support of Petition for Certiorari at 14-15; James C. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* 5-28 (1992). *See also* Daniel L. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Video: Law and Policy* § 3.02[7] at 3-26 n.13 (1992).

One of the evident purposes of the Cable Act was to provide distributional equity in the provision of cable services. Section 621(a)(3) of the Cable Act specifically requires that a franchising authority "assure that access to cable service is not denied to any group of potential residental cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541 (a)(3). This provision was included to prevent cable operators from "redlining" their service area to exclude less profitable segments of the market. *See* Brenner, *Cable Television* §§ 3.02[7] at 3-26 (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696). Hence, the franchising system allows a city to require that a cable system provide "service to all areas of the city, including poor or sparsely populated areas that might not get cable television unless the franchise specifically required that they be served." Goodale, *All About Cable* § 4.02[1] at 4-7. If desirable low-cost pockets of consumers are "skimmed off" by an unregulated SMATV system, community-wide cable operators will be prevented from cross-subsidizing their higher cost

customers with the profits from their lower cost customers.[12] The result is higher rates—or no service—for the higher cost, lower profit segment of the market, a result antithetical to the basic precepts of community-wide franchising.

B. Congress Predicated the Scope of Regulation on the Distinction Between Commonly and Separately Owned Multi-Unit Dwellings, Not On Use or Non-Use of Public Rights-of-Way

The failure of the court of appeals extends beyond its rejection of these conceivable bases to its improper reliance on its own erroneous presumption that state and local authority is necessarily premised upon, and limited to, a facility's use of a public right-of-way. While the use by cable systems of public rights-of-way has been an historical justification for state and local regulatory control, *see, e.g.*, Goodale, *All About Cable* § 4.03 at 4.34, the court of appeals erred in relying upon that premise when conducting its rational basis review of the express statutory distinction in the Cable Act.

As the court of appeals recognized, the plain language of the statute indicates Congress' unambiguous intent to commit to state and local authority the regulation of many cable facilities which *do not* use public rights-of-way—indeed, all such facilities *except* those used to link commonly owned multi-unit

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[12] In *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 811 n.7 (D.C. Cir. 1984), the court of appeals held that SMATV systems did not present distributional equity concerns since they involve "installation of an earth station on private property." *Id.* When, however, an SMATV system extends beyond the boundaries of commonly owned property to a larger community via cable connections, distributional equity concerns plainly emerge.

dwellings. *See* Pet. App. at 2a; 24a. Hence the distinction at issue reflects Congress' express choice to go beyond the public right-of-way rationale in giving state and local governments regulatory power over cable communications systems. It defies established standards of rational basis review for a court to strike down a statutory distinction because it fails to divide the universe on a particular historical basis which the court finds compelling but upon which Congress, as the FCC painstakingly pointed out, has unambiguously declined to rely. *See In re Definition of a Cable System*, 5 F.C.C. Rcd. 7638, 7641-42 (1990).

The court of appeals' rejection of the statutory distinction expressly chosen by Congress in favor of the right-of-way distinction is almost syllogistic:

> We can conceive of no reason why an *external*, *quasi-private* SMATV facility, but not a *wholly private* facility, should be subject to local franchising. Neither uses a public right-of-way.

Pet. App. at 4a (footnotes omitted) (emphasis in original). The unstated premise of the court of appeals' statement is that local franchising authority necessarily depends upon use of a public right-of-way. The court goes on summarily to dispense with proffered conceivable bases for the distinction on the grounds that the FCC "has wholly failed to flesh these out or to suggest some alternative rationale." *Id.* The court of appeals thus begins with the assumption that the only conceivable purpose for allowing cities to regulate cable facilities is the historical "purpose" of allowing them to regulate their own public rights-of-way, and requires compelling, "fleshed out" proof of any alternative or additional

purpose for allowing local control. Not only does this methodology place the burden on the wrong party in contravention of well-settled principles of rational basis review, *see* discussion *supra* at 11-12, it introduces an extraneous and legally irrelevant factor into the analysis—an historical justification that Congress intentionally chose not to rely upon in drafting the legislation.

In this case, the court of appeals applied a heightened level of scrutiny to a congressional decision to extend state and local control beyond a point which the court itself apparently viewed as the appropriate boundary—the use of a public right-of-way. Yet Congress, not the judiciary, is the appropriate body to decide whether and on what basis to confer regulatory authority on States and cities in the cable television field. Simple judicial disagreement with the resulting division of authority does not empower a court to override that decision or to create a presumption against its validity. *See, e.g., Ferguson*, 372 U.S. at 731-32. Instead, the task of a reviewing court is limited to determining whether those challenging the statutory distinction have carried their heavy burden of proof and shown it to be "so palpably arbitrary" as to offend equal protection. *Metropolis Theater*, 228 U.S. at 69.

The logical implication of the court of appeals' decision is to place in question the ability of cities to regulate *any* cable facilities that do not use a public right-of-way—whether or not those facilities link multi-unit dwellings. *See* Br. NCTA 12 & n.34. Indeed, the court of appeals' decision has already been viewed by some as permitting unfranchised SMATV systems to link up single family homes in private

residential communities and trailer parks, as long as no public right-of-way is used. *See id.* at 15 n.38; *SMATV Ruling Appealed to High Court*, Multichannel News, November 9, 1992 at 37.[13] It is evident that the larger the SMATV loophole is expanded, in this and other ways, the less meaningful will be the remaining control which States and local governments have over "traditional" cable systems.

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[13] The recent rapid growth of private residential communities makes this potential effect particularly significant. *See* Advisory Commission on Intergovernmental Relations, *Residential Community Associations: Private Governments in the Intergovernmental System?* 3 (1989) (estimating that there may be as many as 130,000 residential community associations in the United States, ranging in "population size from fewer than ten residents to as many as 68,000").

Moreover, an interpretation that would extend the Cable Act's exception to SMATV facilities serving single family homes in private communities would contravene "[l]ongstanding [FCC] precedent, legislative intent, and the clear language of the Cable Act and the Commissioner's Rules." *In re Massachusetts Community Antenna Television Commission*, 2 F.C.C. Rcd. 7321 (1987) (rejecting a contention that a facility serving a private residential development without using any public right-of-way was exempted from local franchising requirements), *appeal dismissed sub nom Channel One Systems, Inc. v. FCC*, 848 F.2d 1305 (D.C. Cir. 1988).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 14, 1993